

## Looking Back on the “Stone Age” of Criminal Procedure

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I started teaching at a law school in the fall of 1957. This was a few years before the Warren Court’s “criminal procedure revolution” got underway.

At that time, very few law schools, if any, had separate courses on criminal procedure (1957 was pre-*Mapp v. Ohio*,<sup>1</sup> pre-*Gideon v. Wainwright*,<sup>2</sup> pre-*Escobedo v. Illinois*,<sup>3</sup> pre-*Massiah v. United States*,<sup>4</sup> pre-*Miranda v. Arizona*<sup>5</sup>).

I do not think any criminal procedure teacher had any *published* materials on the subject. There may have been one or two exceptions: I once heard that Fred Inbau had his own criminal procedure materials at Northwestern Law School but I do not think they were *published* materials.

In the mid-1960s, I taught first-year Criminal Law at three law schools in a 24-month period (Minnesota, Michigan, and Harvard). None of the three law schools offered a *separate* course on criminal *procedure*.

If I had to pick the one case that changed everything, it would have to be *Miranda*. Soon after *Miranda* was handed down in June 1966, law school deans began scrambling to find people to teach Criminal Procedure. As it turned out, my co-authors and I were already on the scene—in a way. In June of 1964, Bill Lockhart, Jesse Choper, and I had published the first edition of our casebook on constitutional law—but we had a number of chapters or sections on criminal procedure matters: “Right to Counsel”; “Arrest, Search and Seizure”; “Police Interrogation & Confessions”; and “Trial by Newspaper & TV.”<sup>6</sup>

So, we decided to put the criminal procedure materials in its own pamphlet and publish it separately. At the time, criminal procedure was taught in one of three courses: Evidence, Constitutional Law, or first-year Criminal Law. Because both Constitutional Law and Evidence were so crowded, an ever-increasing number of first-year Criminal Law instructors spent the last ten or fifteen hours teaching criminal procedure.

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<sup>1</sup> 367 U.S. 643 (1961).

<sup>2</sup> 372 U.S. 335 (1963).

<sup>3</sup> 378 U.S. 478 (1964).

<sup>4</sup> 377 U.S. 201 (1964).

<sup>5</sup> 384 U.S. 436 (1966).

<sup>6</sup> WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPER, CONSTITUTIONAL LAW: CASES, COMMENTS & QUESTIONS (1st ed. 1964).

For a good number of years, I taught all three courses: Constitutional Law and Evidence and first-year Criminal Law. I remember one student coming up to me after class one day. She told me that she had taken all three of my classes. She added that my message on search and seizure and confessions was consistent, and she said “I liked what you said each time.”<sup>7</sup>

There was one big problem in the 1960s: there were few, if any, *published* and *edited* materials on *Mapp*, *Gideon*, *McNabb v. United States*,<sup>8</sup> *Mallory v. United States*,<sup>9</sup> *Spano v. New York*,<sup>10</sup> *Escobedo*, and *Massiah*. Moreover, there were neither edited versions of significant articles written by Judges Henry Friendly, Walter Schaefer, Roger Traynor, and Charles Breitler nor were there any edited versions of articles by Professors Frank Allen, Joe Grano, Fred Inbau, Paul Bator, and Jim Vorenberg.

One reason we used so many extracts from law review articles was because they discussed issues that had not yet been resolved by the courts. Moreover, there were not enough cases to fill up a big casebook.

We also used various reports. One that comes quickly to mind was the 1963 *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (This was often called the “Allen Committee Report,” after its principal author, Frank Allen).<sup>11</sup>

Let us take a look at some of the articles published in the 1950s and 1960s. Judge Schaefer could not resist talking about “the quality of newness” that marks the field of criminal procedure. In a famous 1956 article, Schaefer noted that as late as 1938, the right to counsel in *federal* courts merely meant that a lawyer would be permitted to appear for the defendant *only if* the defendant could afford to hire one.<sup>12</sup>

In a 1966 article, Professor Herbert Packer called recent developments by the Supreme Court “moves of desperation”—because the Court had come to realize that the quality of criminal justice in America was so poor.<sup>13</sup> Professor Packer believed that the Court had sensed a law-making vacuum into which it felt it had to rush.<sup>14</sup> Packer wrote about (1) the Crime Control Model and (2) the Due Process

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<sup>7</sup> I did not know about it at the time, but she brought her daughter to class, although her daughter was only five or six years old. The mother was Jean King and her daughter was Nancy, one of my future co-authors.

<sup>8</sup> 318 U.S. 332 (1943).

<sup>9</sup> 354 U.S. 449 (1957).

<sup>10</sup> 360 U.S. 315 (1959).

<sup>11</sup> FRANCES A. ALLEN ET AL., REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

<sup>12</sup> Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 1–2 (1956).

<sup>13</sup> Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 240 (1966).

<sup>14</sup> *Id.*

Model. The latter, he opined, was starting to replace the former.<sup>15</sup> Professor Packer did not deny that nine men (the nine U.S. Supreme Court Justices) were not enough but he emphasized that they were better than nothing at all.<sup>16</sup>

In the 1960s, Judge Henry Friendly was probably the most respected lower court federal judge in America. But he balked at the notion that the High Court should be trying to turn the Constitution into “a Code of Criminal Procedure.”<sup>17</sup>

Professors Paul Bator and Jim Vorenberg offered the *Model Code of Pre-Arraignment Procedure* as an alternative to what soon became known as the “*Miranda* approach.” They were the principal Reporters for the new American Law Institute project. The extract from the 1966 Bator-Vorenberg article, which first appeared in the 1966 *Columbia Law Review*, ran nine full pages in our casebook.<sup>18</sup> Bator and Vorenberg asked the Supreme Court to wait a while—a few years—until the American Law Institute completed its work.

As it turned out, three Justices (Harlan, Stewart, and White) were persuaded. (A fourth, Justice Clark, also dissented.) But a majority of the Court was not interested in waiting. They had the votes—and they were ready to make a move—a big move.

The third edition of our casebook contained many new or greatly expanded chapters on such topics as federal habeas corpus, sentencing, plea bargaining, professional responsibility, and discovery.

In order to “fill out” the casebook—and make it a “full-fledged” criminal procedure casebook—we needed help. We needed additional authors, and I knew just the people we should turn to: Jerry Israel and Wayne LaFave (In recent times, we have added three additional co-authors).

I have always thought that acquiring a new co-author is a little bit like acquiring an additional spouse. I must say that I have been blessed. All of our co-authors have worked out very well.

In the 1960s a number of riots or civil disorders took place in various cities (including Detroit). Many people were badly treated. This was the time when I first met Judge Wade McCree, who was to become the second African American United States Solicitor General (Thurgood Marshall had been the first).

At the time of the Detroit civil disorder, McCree was a federal judge residing in Detroit. But whenever he ran out of his office—to try to restore order—either the police or the National Guard started shooting at him. Finally, Judge McCree stopped trying to restore order. He told me later: “When the police or National

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<sup>15</sup> *Id.* at 239.

<sup>16</sup> *See id.* at 242.

<sup>17</sup> Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953–54 (1965).

<sup>18</sup> Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966).

Guard see me, they don't see a judge; all they see is a black man—and they start shooting.”

After the disturbances of the 1960s, we hurriedly put together a new chapter—one called “The Administration of Criminal Justice During Riots and Civil Disorders.” A number of very useful student notes were written on this topic, and we made extensive use of them.

Fortunately, very few civil disorders since the 1960s have occurred. So when we came to the 4th edition of our casebook, we deleted the entire chapter on riots and civil disorders.

Happily, we have been able to keep out such a chapter for the last eleven editions.